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No. 13

In the Supreme Court of the United States

October Term, 1961

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v.

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# In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 12

WILLIAM A. PRICE, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE UNITED STATES

### OPINIONS BELOW

The opinion of the court of appeals (R. 1–5) is reported at 280 F. 2d 715. The opinion of the district court (J.A. 136–137; Pet. 17–18) is not reported.

### JURISDICTION

The judgment of the court of appeals was entered on June 18, 1960 (R. 5). On July 13, 1960, Mr. Justice Black extended the time for filing a petition for a writ of certiorari to and including August 17, 1960. The petition was filed on August 7, 1960, and was granted on June 19, 1961 (R. 7; 366 U.S. 959). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Senate Resolution 366 of the 81st Congress and Senate Resolution 58 of the 84th Congress authorized the Internal Security Subcommittee to conduct the hearing at which petitioner appeared.

2. Whether petitioner can claim for the first time at his trial that, under the Legislative Reorganization Act of 1946, the Subcommittee could not properly hold the hearing at which he appeared and, if he can, whether the hearing was improperly held.

3. Whether the Subcommittee's investigation into Communist activities in the news media field violated petitioner's rights under the First Amendment.

4. Whether petitioner raised the question of pertinency at the time he refused to answer the questions, and, if not, whether he can claim that he was not apprised of their pertinency for the first time at his trial.

5. Whether the government proved that the questions petitioner refused to answer were pertinent to the subject under inquiry.

6. Whether the indictment was invalid because it failed to specify the subject under inquiry and the pertinency of the questions to that subject, did not allege that petitioner's failure to answer was wilful, and did not state the delegation of authority from the parent Committee to the Subcommittee.

7. Whether petitioner, who was indicted by a grand jury composed, in part, of federal employees, was entitled to dismissal of the indictment or a hearing on the basis of general allegations that such jurors were biased and afraid as a result of the government security program.

8. Whether the trial court denied petitioner the right of cross-examination.

9. Whether petitioner may raise a claim for the first time in his brief on the merits in this Court that the Subcommittee violated his rights under the Fourth and Fifth Amendments because it did not have probable cause to subpoena him.

## STATUTES AND RESOLUTIONS INVOLVED

Relevant portions of 2 U.S.C. 192, as amended; the Legislative Reorganization Act of 1946, c. 753, Title I, Section 134, 60 Stat. 832 (2 U.S.C. 190b(b)); and Senate Resolution 366, 81st Cong., 2d Sess., are set forth in petitioner's brief at pp. 46–48. In addition, Section 2 of Resolution 366 states:

> The Committee, or any duly authorized subcommittee thereof, is authorized to sit and act at such places and times during the sessions, recesses, and adjourned periods of the Senate * * * as it deems advisable.

## STATEMENT

Petitioner was charged in an eight-count indictment in the District Court for the District of Columbia with having refused, in violation of 2 U.S.C. 192, to answer eight questions, pertinent to matters under inquiry, put to him by the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Senate Committee on the Judiciary (J.A. 1). Having waived his right to trial by jury, petitioner was found guilty by the district court on all eight counts. He was sentenced to three months' imprisonment

and to pay a fine of five hundred dollars (J.A. 11). On appeal, the conviction was affirmed (Pet. 20).

The pertinent facts may be summarized as follows:

On June 28 and 29, 1955, the Internal Security Subcommittee heard the testimony of Winston Burdett, a newspaperman and broadcaster, in connection with its continuing investigation since 1950 into Communist subversion and the operation of the internal security laws.[1]

Burdett, who said that he had been a member of the Communist Party from 1937 until the early 1940's, testified concerning attempts by the Communist Party to influence public opinion by infiltration of Party members into the newspaper field. He stated that he became a member of the Party's unit in the Brooklyn Eagle in 1937 while employed by that newspaper (Hearings, Part 14, p. 1324); that the unit included several reporters and editorial writers (*id.*, at pp. 1325–1327, 1359–1360); that Party leaders induced him to become a foreign correspondent for the Eagle in order to use his position to act as an espionage agent for the Soviet Union and that he continued these activities while subsequently employed by Transradio Press and the Columbia Broadcasting System during World War II (*id.* at pp. 1328–1341, 1347–1353); and that employees of other New York newspapers had been Party members around 1940 (*id.* at pp. 1360–1363).

[1] Hearings Before the Subcommittee To Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Committee on the Judiciary, United States Senate [hereinafter "Hearings"], 84th Cong., 1st Sess., Part 14, pp. 1323–1363.

The counsel of the Subcommittee testified at petitioner's trial concerning the reason petitioner was subpoenaed to testify. At the time petitioner was subpoenaed, the Subcommittee had information that petitioner, a newspaperman, had been a candidate for vice president of the New York Newspaper Guild in 1949 on the so-called "Rank and File" ticket, which was known to be the Communist-supported slate (J.A. 50–51, 100–101); that Communists had successfully infiltrated the Guild (J.A. 53, 100–102); that a statement in defense of the Communist Party appeared in the Daily Worker in 1941 signed by a William Price (J.A. 53); that petitioner had received numerous visits from Marcella Hitschmannova, who was known to be a Communist courier and to have served the Communist movement in other capacities for years (J.A. 52–53, 65, 96–97);[2] that these visits were continuing up until the time petitioner was called as a witness (J.A. 65); that petitioner, after returning from wartime naval service, had flown an airplane on a trip to Central and South America, during which time he was accompanied by a courier for the Communist Party (J.A. 54–55, 65). The Subcommittee, however, had no information that directly showed petitioner to be a member of the Communist Party (J.A. 55).

On the basis of this information, the Subcommittee decided to call petitioner as a witness in executive

[2] The Subcommittee also had other information concerning petitioner and Marcella Hitschmannova which could not be described at the trial because of its highly confidential nature (J.A. 52, 54–55).

session. Pursuant to subpoena, petitioner, accompanied by counsel, appeared and testified at executive session held in New York City on December 7, 1955 (J.A. 55). At the executive session, petitioner answered several preliminary questions as to his identity and backgroumd (J.A. 72–74), but refused to answer questions by the Subcommittee concerning the information described above (J.A. 76–79). Petitioner refused to answer these questions on the basis of a lengthy legal memorandum (Gov. Ex. 3; J.A. 25–34). This memorandum raised chiefly the objection that the Subcommittee was invading "my political beliefs, my religious beliefs, any other personal and private affairs, and my associational activities" protected by the First Amendment (J.A. 26), but also invoked the doctrine of separation of powers and the *ex post facto* and bill of attainder clauses of the Constitution (J.A. 28, 29–34).

After petitioner had completed his testimony in executive session, the Subcommittee and its counsel were convinced that petitioner possessed information which he was withholding and, further, that such information would be useful to the Subcommittee in its investigation. This conviction was based upon a number of factors, such as the testimony petitioner had given, the testimony apparently withheld, the manner in which petitioner withheld it, his "constant conferring with counsel about the questions which a man who had no information would find no difficulty in answering promptly," and his demeanor during the questioning (J.A. 85–86). The Subcommittee and its counsel were hopeful that petitioner, "if we

called him back and went at it right, would come clean and give the committee the information that we wanted," as had other witnesses on other occasions (J.A. 90). The Subcommittee believed that it "had information which if true made it clear that Mr. Price had a great deal of information over and above and beyond what we had, which would be of value to the committee" (J.A. 90–91).

The Subcommittee held public hearings in Washington, D.C., on January 4, 5, and 6, 1956. At the opening of the hearings on January 4, the Chairman of the Subcommittee announced that the hearings about to commence "stem from sessions of this subcommittee held on June 28 and 29, 1955, in which we heard the testimony of Mr. Winston Mansfield Burdett, a newspaperman and broadcaster" (Gov. Ex. 8, p. 1587).[3] Burdett had, the Chairman continued, disclosed the names of persons whom he knew as members of the Communist Party in the early 1940's. The Chairman concluded that the investigation was of great importance because (*ibid.*):

> [A]mong the persons involved in this investigation have been many who were or are members of the press, and that the international Communist conspiracy has as one of its primary aims the influencing of public opinion, thus carrying on its psychological warfare against the United States and its institutions from inside by methods of penetration. * * * The

[3] Government Exhibit 8 is Part 17 of the Hearings.

present hearings open up a subsequent chapter to the Burdett testimony of June 28 and 29, 1955.

Following the opening statement, another member of the Subcommittee, Senator Hennings, apparently apprehensive that the public might misconstrue the purpose of the hearings, further explained (Gov. Ex. 8, p. 1588):

> [T]his is not in any sense an attack upon the free press of the United States.
>
> * * *
>
> Of course, the Committee is interested in the extent and nature of so-called Communist infiltration if such exists, into any news-dispensing agency.
>
> * * * [T]his is not an attack upon any one newspaper, upon any group of newspapers as such, but an effort on the part of this committee to show such participation and such attempt as may be disclosed on the part of the Communist Party in the United States or elsewhere, indeed to influence or to subvert the American press.

In response, the Chairman approved Senator Hennings' description of the purpose of the hearings as a "very fine and very accurate statement, one with which the Chair certainly agrees, in its entirety (*ibid*). The Chairman went on to say (*ibid.*):

> We are not singling out any newspaper and not investigating any newspaper or any group of newspapers. We are simply investigating communism wherever we find it, and I think that when this series of hearings is over that no one can say that any newspaper or any employees of any one newspaper has been singled out.

Eighteen witnesses were called by the Subcommittee to testify at the hearings on January 4, 5, and 6, 1956.

All had been or were then employed in mass communications. Petitioner, together with the same counsel who had represented him at the executive session, appeared before the Subcommittee on January 5, 1956. Petitioner testified concerning his employment as a newspaper reporter and past service as a naval aviator (J.A. 17–18). He refused to answer whether he had been a candidate for vice president on the "Rank and File" slate of the New York Newspaper Guild in 1949 (J.A. 18–19). This refusal, as well as petitioner's subsequent refusal to answer other questions, was based upon the same legal memorandum which he had submitted to the Subcommittee at the executive session (J.A. 19).

Petitioner was then asked whether he was at that time a member of the Communist Party (count 1) (J.A. 23). After consultation with his counsel, petitioner refused to answer the question on the basis of the written memorandum which he relied on at the executive session, and "further on the grounds that no legislative purpose can be served by asking me, at this time again, questions, the answers to which this committee knows full well from the executive hearings" (J.A. 23). Petitioner likewise refused to answer whether he had "ever attended Communist meetings" (count 2) (J.A. 35):

> * * * on the grounds stated in my objection and on the further grounds that no legislative purpose can be served by asking this question again, inasmuch as the reply has already been elicited by this committee in executive session.

For these same reasons, petitioner refused to answer whether he knew Marcella Hitschmannova (count 3) (J.A. 36). The Subcommittee's counsel then informed petitioner of the Subcommittee's interest in the subject of this question: "Do you know, Mr. Price, that one Marcella Hitschmannova, now connected with the United Nations, was a courier for the Communist Party?" (J.A. 36). Petitioner persisted in his refusal to answer (J.A. 37).

Petitioner declined to answer a question as to whether he had ever flown an airplane for or at the direction of the Communist Party. His refusal was based on his previously stated grounds and for the reason that he had answered such a question in the executive session (J.A. 38). When asked whether he had ever flown outside the continental limits of the United States, he admitted that he had done so as a pilot for the United States Navy (J.A. 39). Upon being confronted with the transcript of the executive session—where he initially answered this question in the negative, and then, upon being informed of the reason for the question, refused to answer—petitioner contested the accuracy of the record (J.A. 40). After a colloquy at the public session between petitioner and the Chairman, petitioner ultimately admitted without qualification that he had flown outside the continental limits of the United States (J.A. 41).

Thereupon, petitioner was asked whether he had ever flown "considerable mileage in Central America and Latin America" (count 4). He refused to answer "on the grounds previously stated" (J.A. 41). For the same reason he refused to answer whether he had

flown a privately own airplane in South America and had another person along with him (count 5) (J.A. 41–42). Asked whether the person who accompanied him on that trip was a courier for the Communist International, petitioner at first noted that a similar question had been asked him in the prior executive session (J.A. 42). Upon being directed to answer, petitioner responded by giving his answer in the negative (J.A. 42). Thereupon, the Subcommittee inquired (count 6) (J.A. 43):

> For the sake of testing the credibility of your answer to that question, I ask you this: Who was the person who accompanied you on that lengthy flight in Latin and Central America?

Petitioner stated that he "would like to know what right the committee has in testing my credibility" (J.A. 43). Upon being directed to answer the question, petitioner refused "on the same grounds as previously stated" (J.A. 43). He disclaimed any claim of right or privilege under the Fifth Amendment (J.A. 43).

As the public session was about to close, petitioner made a lengthy statement in which he denied that he had (J.A. 44):

> * * * ever been involved in such an activity as suggested here in any way whatsoever at anyone's direction, at the direction of any of the organizations as were mentioned in the closed hearings, or any such organizations; that anyone who ever flew with me was ever engaged in such an activity; that I ever had knowledge of such activity; or that I was ever

> approached to participate in such an activity; * * *.

The counsel for the Subcommittee then stated (J.A. 44):

> I think, in view of this question, Mr. Chairman, this statement by the witness again, we should have a question, or perhaps several questions, going to the credibility of the statement.

Committee counsel then asked petitioner when he had "made this lengthy trip to Latin and Central America" (count 7) (J.A. 44). Petitioner declined to answer the question "on the grounds stated in the objection, and on the additional grounds that my credibility as a witness is not at question here" (J.A. 44).

Petitioner thereafter answered a series of further questions related to his unsolicited statement, admitting only that he had taken a trip to South America in order to sell an aircraft and to do some free-lance stories along the way (J.A. 45). He testified that the airplane was his own and that he sold it to someone whose name he did not recall in Panama City who he believed was a resident of Panama or a United States resident of the Canal Zone. Petitioner also testified that he contacted the buyer through an advertisement in a Panama City newspaper, and that he went to Panama to sell the airplane because he had heard there was a good market for airplanes in Central America (J.A. 45–47). Finally, petitioner was asked and refused to answer whether he had ever

been a member of the Communist Party (count 8) (J.A. 47).

## SUMMARY OF ARGUMENT

### I

As we have shown in our brief in *Liveright* v. *United States*, No. 11, this Term, pp. 19–28, Senate Resolution 366, which established the Subcommittee, is sufficiently clear, at least when taken together with its history, to authorize the Subcommittee to investigate Communist activities. There is no basis for carving an exception out of this general authorization for Communist activities in news media, which was the subject under inquiry when petitioner testified. Subsequent to this investigation and other investigations into Communist activities in closely related areas, the Senate passed resolutions authorizing the Subcommittee to continue its investigations and providing appropriations for the purpose. Thus, this issue is squarely controlled by *Barenblatt* v. *United States*, 360 U.S. 109, 121, where this Court held that, "[n]ot only is there no indication that the House ever viewed the field of education as being outside the Committee's authority under Rule XI, but the legislative history affirmatively evinces House approval of this phase of the Committee's work."

### II

Petitioner claims that, under the Legislative Reorganization Act of 1946, the Subcommittee could not properly hold the hearing at which he appeared, since it had not received permission from the Senate to

hold a hearing while the Senate was in session. We have shown in our briefs in *Shelton* v. *United States*, No. 9, this Term, pp. 25–29, and *Liveright, supra*, pp. 28–32, that a witness before a Congressional committee who refuses to answer its questions is not entitled to raise objections to the committee's procedures which he has not raised before the committee. We have also shown in our brief in *Liveright*, pp. 32–33, that, in any event, this contention is without merit.

III

For the reasons stated in our brief in *Shelton, supra*, this Term, pp. 48–50, the Subcommittee's investigation did not violate the First Amendment.

IV

Petitioner cannot excuse his refusal to answer by the alleged lack of pertinency of the questions.

A. He made no objection before the Subcommittee to the pertinency of any of the questions on which he was indicted and convicted. Therefore, as shown in our brief in *Shelton, supra*, pp. 25–29, he cannot claim that the Subcommittee failed to apprise him of the subject under inquiry or the pertinency of the questions to that subject.

B. The government proved that the subject under inquiry when petitioner testified was Communist activity in news media. The Chairman of the Subcommittee and one of its members clearly stated, the day before petitioner testified, that Communist activity in news media was the purpose of the hearings; all the witnesses who testified at the hearings worked

in this field; and petitioner's counsel repeatedly said at petitioner's trial that this was the subject of the hearings. The pertinency to this investigation of three of the questions petitioner refused to answer—whether petitioner, who was admittedly a newspaper reporter, was or had ever been a Communist or had attended Communist meetings—was obvious.

Petitioner contends that the Subcommittee counsel testified and the Assistant United States Attorney stated at the trial that the subject under inquiry was Communist activities generally. This subject, however, is perfectly consistent with the subject of Communist activities in news media; the latter is merely a portion of the broader subject. Moreover, if the subject was Communist activities generally, this is a proper subject within the the authority of the Subcommittee (see our brief in *Liveright, supra,* pp. 42–44) and all eight questions were pertinent, either on their face or as shown by the government's evidence at the trial, to this subject.

V

Petitioner claims that he was entitled to dismissal of the indictment or at least a hearing because of the bias of government employees who were on the grand jury. We have shown in our brief in *Shelton, supra,* pp. 62–76, that a defendant cannot challenge an indictment because of the bias of grand jurors unless he can show specific and convincing evidence of strong bias in individual grand jurors. Here, as in *Shelton,* petitioner made no allegations with respect to individual grand jurors and did not even state any spe-

cific facts of bias among goverment employees generally.

## VI

Petitioner contends that the indictment was required to specify the subjects under inquiry and the pertinency of the questions to those subjects, to allege that petitioner's refusal to answer as wilful, and to state the delegation of authority from the present committee to the Subcommittee. We point out in our brief in *Shelton, supra,* pp. 78–83, that under Rule 7(c) of the Federal Rules of Criminal Procedure and the decisions of this Court and the courts of appeals, an indictment need not specify the subject under inquiry. For the same reasons, it need not provide the reasoning underlying the allegation that the questions were pertinent. We have shown in our brief in *Liveright, supra,* pp. 50–51, that an indictment need not allege that the witness' refusal to answer the questions was wilful if, as here, the indictment alleges that the witness has "unlawfully" refused to answer.

Petitioner's contention that the indictment did not state the delegation of authority from the present Judiciary Committee to the Subcommittee was not presented in the petition for a writ of certiorari and therefore it is not before the Court. In any event, no court has ever suggested that such an allegation is necessary under Rule 7(c) even though, insofar as we know, no indictment under 2 U.S.C. 192 has made such an allegation.

VII

Petitioner was not deprived of his right of cross-examination by the trial court's denial of his motion to subpoena the Subcommittee's files and its refusal to allow him to ask certain questions on cross-examination of the Subcommittee counsel concerning the information on the basis of which the Subcommittee subpoenaed petitioner. The trial court allowed petitioner the opportunity to cross-examine the Subcommittee counsel on this subject extensively. It merely refused to allow him to subpoena the files of the Subcommittee and to secure from Subcommittee counsel confidential information, *i.e.*, the identity of the Subcommittee's confidential informants, information which would have provided considerable indication of their identity, and information as to the manner in which the Subcommittee secured confidential information. As we show in our briefs in *Shelton, supra,* pp. 59–60, and *Liveright, supra,* pp. 51–57, a witness who refuses to answer questions before a Congressional committee is not entitled to disclosure of the files of the committee, either directly or by cross-examination of a government witness, before he can be punished for contempt.

VIII

Petitioner claims that his rights under the Fourth and Fifth Amendments were violated. He cannot raise this contention, however, since it was not raised before the Subcommittee, at his trial, in the court of appeals, or even in his petition for certiorari. In

any event, the Fourth Amendment does not apply to subpoenas to testify as opposed to subpoenas *duces tecum* (see our brief in *Shelton, supra,* pp. 43–46). Similarly, the due process clause of the Fifth Amendment is not relevant. But even if the Fourth and Fifth Amendments do apply, they require—like the First Amendment as construed in *Barenblatt, supra,* 360 U.S. at 134—only that the committee have reasonable basis for believing that the witness has information of value to the investigation (see our brief in *Shelton,* pp. 46–48, 50–55). Here, the Subcommittee had considerable information that petitioner, admittedly a newspaperman, had been engaged in Communist activities.

## ARGUMENT

Petitioner was convicted of refusing to answer eight questions asked him by a Congressional committee concerning the Communist Party—whether he was at that time a member of the Communist Party (count 1); whether he had ever attended Communist meetings (count 2); whether he knew Marcella Hitschmannova (count 3); whether he had flown considerable mileage in Latin America (count 4); whether he, along with another person, had flown a privately-owned plane in South America (count 5); who had accompanied him on a lengthy flight in Latin America (count 6); when he had made the lengthy trip to Latin America (count 7); and whether he had ever been a member of the Communist Party (count 8). Since this Court has upheld the constitutional validity of the questions involved in counts 1 and 8 (*Barenblatt* v. *United States,* 360 U.S. 109, 114–115, 126 at note 25), and since their perti-

nency is particularly clear (*id.* at 125), we will stress these two questions. Petitioner was given a general sentence and a fine on all eight counts which was less than the maximum authorized by 2 U.S.C. 192 under any one count; therefore, the judgment below must be affirmed if any one of the counts is valid. *E.g., Barenblatt* v. *United States,* 360 U.S. at 115 In addition, we submit that petitioner was properly convicted on all eight counts.

## I

### THE RESOLUTIONS ESTABLISHING AND CONTINUING THE SENATE SUBCOMMITTEE ON INTERNAL SECURITY AUTHORIZED THE SUBCOMMITTEE TO INVESTIGATE COMMUNIST ACTIVITIES IN THE UNITED STATES

Petitioner claims (Pet. Br. 34–36) that the resolution authorizing the Internal Security Subcommittee is "unconstitutionally vague." As we show in our brief in *Liveright* v. *United States,* No. 11, this Term, pp. 19–28, however, this Subcommittee has been authorized to investigate Communist activities. S. Res. 366, 81st Cong., 2d Sess.; S. Res. 58, 84th Cong., 1st Sess. Therefore, the Subcommittee was authorized to question petitioner concerning the subject under inquiry when petitioner testified—*i.e.,* Communist infiltration of news media (see *infra,* pp. 26–27).

Petitioner suggests (Pet. Br. 36) that, whatever scope Senate Resolution 366 may have, it does not authorize an investigation of Communist activities in news media. A similar contention was raised in *Barenblatt* that Rule XI relating to the House Un-American Activities Committee did not include Communist activities in the field of education. This contention, however, was

rejected because the Court found that, "[n]ot only is there no indication that the House ever viewed the field of education as being outside the Committee's authority under Rule XI, but the legislative history affirmatively evinces House approval of this phase of the Committee's work" (360 U.S. at 121). The Court then noted that the Committee had conducted previous investigations in education.

There are at least as strong reasons for not carving an exception for Communist activities in news media out of the Subcommittee's pervasive authority to investigate Communist activities. First, the news media are no more within the protection of the First Amendment than is college education. Indeed, the concurring opinion in *Sweezy* v. *New Hampshire,* 354 U.S. 234, 261–263, indicated that college education is perhaps a particularly sensitive area. Thus, there is no constitutional reason why the language and history of Senate Resolution 366, giving authority to the Subcommittee to investigate Communist activity generally, should not be applied to include what is logically a portion of this general subject, Communist activities in the news media.

Second, as in *Barenblatt,* the legislative history of Senate Resolution 366 and its successors shows that the Senate approved this phase of the Subcommittee's work. The Subcommittee had earlier conducted investigations of Communist activities in areas closely related to the subject of investigation here—Communist activities in the fields of radio and television, in the field of education, and in propaganda (see our brief in *Liveright,* pp. 26–27, note 6). After the

investigation involved here, the Subcommittee in 1955 conducted hearings entitled "Communist Activity in Mass Communications," which inquired into "the question, among others, of whether Communists are active under cover of accreditation of the United Nations as correspondents and otherwise." Hearings, Subcommittee to Investigate the Administration of the Internal Security Act and other Internal Security Laws of the Committee on the Judiciary, United States Senate, *Communist Activity in Mass Communications,* 85th Cong., 2d Sess., p. 1. And, of course, the Subcommittee heard the testimony of Winston Burdett (see *supra,* p. 4) and conducted the hearings involved in this case, both of which involved Communist activities in the communications field.

Subsequent to, and with full knowledge of, all these investigations, the Senate has passed resolutions authorizing the Subcommittee to continue its investigations and providing appropriations for this purpose (see our brief in *Liveright, supra,* pp. 27–28). Indeed, in 1956 (shortly after the hearing involved here), the Senate extended the life of the Subcommittee with the same jurisdiction and appropriated a large sum (S. Res. 174, 84th Cong., 2d Sess.) on the basis of the Subcommittee's 1955 Report. See S. Rept. 1385, 84th Cong., 2d Sess. That report described Winston Burdett's testimony concerning Communist infiltration of the press and stated that subsequent hearings confirmed his testimony and provided new information on such infiltration into various New York newspapers (*id.* at p. 4). The report

then said "[t]he subcommittee's investigation, which was set in motion by Mr. Burdett's revelations, had not been completed at the end of 1955" (*ibid.*).

## II

### PETITIONER CANNOT CLAIM FOR THE FIRST TIME AT HIS TRIAL THAT UNDER THE LEGISLATIVE REORGANIZATION ACT OF 1946 THE SUBCOMMITTEE COULD NOT PROPERLY HOLD THE HEARING AT WHICH HE APPEARED. EVEN IF PETITIONER COULD MAKE THIS CONTENTION, SENATE RESOLUTION 366 AUTHORIZED THE HEARING

Petitioner asserts (Pet. Br. 43–44) that the Subcommittee when he appeared before it was not a competent tribunal because the Legislative Reorganization Act of 1946 (see Pet. Br. 46) provides that "[n]o standing committee of the Senate * * * shall sit, without special leave, while the Senate * * * is in session." This contention is without merit.

A. First, as we have shown in our briefs in *Shelton* v. *United States*, No. 9, this Term, pp. 25–29, and *Liveright* v. *United States*, *supra*, pp. 29–32, a witness before a Congressional committee is not entitled to raise objections to the procedures followed by the committee at his trial for contempt which he has not raised before the committee itself. See *United States* v. *Bryan*, 339 U.S. 323, 330–335; *Emspak* v. *United States*, 203 F. 2d 54, 56 (C.A. D.C.), reversed on other grounds, 349 U.S. 190. Here, petitioner's refusal to answer the questions asked by the Subcommittee was based on precisely the same statement of legal argument and authorities relied on by the petitioner in *Liveright*. In neither case did the witness even sug-

gest any objection to the authority of the Subcommittee (see *supra*, p. 6).[4]

B. In any event, we have shown in our brief in *Liveright, supra*, pp. 32–33, that petitioner's contention under the Legislative Reorganization Act of 1946—that the Subcommittee could not hold the hearing while the Senate was in session—is without merit.

## III

### THE SUBCOMMITTEE'S INVESTIGATION DID NOT VIOLATE THE FIRST AMENDMENT

Petitioner claims (Pet. Br. 37–43) that the Subcommittee's investigation violated his rights under the First Amendment. As we have demonstrated, however, in our brief in *Shelton, supra*, pp. 48–50, which involved the same investigation and hearings, petitioner's contention is without merit. Here, as in *Shelton*, the Subcommittee was investigating Communist infiltration of news media, not the news media themselves (see *infra*, pp. 26–27). All the questions asked petitioner plainly related to Communist activities.[5]

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[4] If petitioner had objected when he appeared before the Subcommittee, the Subcommittee could have easily met his objections by simply holding the hearing when the Senate was not in session.

[5] Petitioner contends (Pet. Br. 40) that the Subcommittee could have had no valid legislative purpose when it subpoenaed him since it could not constitutionally pass legislation barring Communists from being newspapermen or regulating the content of newspapers. Even if such legislation would be unconstitutional, however, petitioner's two suggested statutes are clearly not the only legislation which can result from an investigation of Communist activity in news media either alone or particularly when combined with investigations of Communist activity in other fields.

## IV

### PETITIONER, HAVING FAILED TO CHALLENGE THE PERTINENCY OF THE QUESTIONS BEFORE THE SUBCOMMITTEE, CANNOT CLAIM AT HIS TRIAL THAT HE WAS NOT SUFFICIENTLY APPRISED OF THE SUBJECT UNDER INQUIRY AND THE PERTINENCY OF THE QUESTIONS. THE QUESTIONS PETITIONER REFUSED TO ANSWER WERE PERTINENT TO THE SUBJECT UNDER INQUIRY

Petitioner contends (Pet. Br. 22–27) that (1) the Subcommittee failed to apprise him when he appeared before it of the subject under inquiry and the pertinency of the questions he refused to answer to this subject; and (2) the government failed to prove at his trial what the subject under inquiry was and the pertinency of the questions he refused to answer to this subject.

#### A. PETITIONER FAILED TO CHALLENGE THE PERTINENCY OF THE QUESTIONS ON WHICH HE WAS CONVICTED BEFORE THE SUBCOMMITTEE AND THEREFORE CANNOT CLAIM AT HIS TRIAL THAT HE WAS NOT APPRISED OF THEIR PERTINENCY

In our brief in *Shelton, supra,* pp. 25–29, we show that a witness before a Congressional committee cannot claim that the committee has failed to apprise him of the subject under inquiry and the pertinency of the questions asked him to this subject unless he raises the issue of pertinency before the committee itself. *Barenblatt* v. *United States, supra,* 360 U.S. at 123–124; *Deutch* v. *United States,* 367 U.S. 456, 469. He cannot wait until trial to raise an objection which the committee could easily remedy.

Petitioner failed to object before the Subcommittee on grounds of pertinency to the questions on which he was indicted and convicted. Earlier, in refusing to answer a question on which he was not indicted, he

inquired of the Subcommittee "why this question is put" (J.A. 18). We doubt, however, that this objection raises the issue of pertinency with the clarity required by the *Barenblatt* and *Deutch* decisions (see our brief in *Shelton, supra,* pp. 28–29). Moreover, this objection was not repeated or even suggested when petitioner refused to answer the questions which are involved here. Instead, he relied entirely on his lengthy legal memorandum (Gov. Ex. 3; J.A. 25–34)—which raised only constitutional objections based on the First Amendment, separation of powers, and the *ex post facto* and bill of attainder clauses—and in addition on his oral claim that the Subcommittee had no valid legislative purpose (J.A. 23, 35, 36, 38). The only suggestion of an objection to pertinency in the memorandum is the statement in petitioner's memorandum that petitioner "might wish to * * * challenge the pertinency of the question to the investigation" (J.A. 33). Considering the very same statement in a substantially similar legal memorandum,* this Court held in *Barenblatt* that the issue of pertinency is not properly raised by statements of a witness which "constituted but a contemplated objection to questions still unasked, and buried as they were in the context of [the witness'] general challenge to the power of the Subcommittee * * *" (360 U.S. at 124). Therefore, here, as in *Barenblatt,* the witness failed "to trigger what would have been the Subcommittee's reciprocal obligation" to explain the pertinency of the questions, and the witness is fore-

* See the record in *Barenblatt* v. *United States*, No. 35, Oct. Term, 1958, pp. 227–235.

closed from raising the issue for the first time in the contempt proceeding.

B. THE QUESTIONS PETITIONER REFUSED TO ANSWER WERE IN FACT PERTINENT

We submit that the government sufficiently proved at the trial that the subject under inquiry when petitioner testified was Communist activity in news media by introducing the transcript of the hearings on January 4, 5, and 6, 1956 (Gov. Ex. 8). At the beginning of the hearings on January 4, the Chairman of the Subcommittee indicated that the purpose of the hearings was to investigate this subject (see *supra*, pp. 7–8). Senator Hennings, another member of the Subcommittee, reiterated that "the Committee is interested in the extent and nature of so-called Communist infiltration if such exists, into any news-dispensing agency" and the investigation was "an effort on the part of this Committee to show such participation and such attempt as may be disclosed on the part of the Communist Party in the United States or elsewhere, indeed, to influence or to subvert the American press" (see *supra*, p. 8). Again, on January 6, the day after petitioner testified, the Chairman stated that the hearings were directed to investigating infiltration of persons identified as Communists into news agencies (Gov. Ex. 8, p. 1717). And Senator Hennings said (*id.* at p. 1718):

> I think that no one will quarrel with nor take issue with the fact that this committee has the right to inquire into all efforts, or indeed, all consummations of efforts of the

> Communist Party to infiltrate newspapers or other media of communication.

All eighteen witnesses who testified at the hearings on January 4, 5, and 6, 1956, worked in the news media field.

In addition, the Subcommittee counsel testified at petitioner's trial that the information the Subcommittee possessed which caused petitioner to be subpoenaed included information that petitioner was a newspaperman and that he had participated in several Communist activities. These activities included running on the Communist-supported "Rank and File" slate for vice-president of the New York Newspaper Guild, which had been infiltrated by Communists (see *supra*, p. 5). The first question which petitioner refused to answer (although he was not indicted for this refusal) concerned whether he had been a candidate for vice-president of the Guild on the "Rank and File" slate (see *supra*, p. 9). When petitioner asked "why this question is put," the Subcommittee counsel answered: "The question is put to qualify you as a person of whom we can ask questions with respect to the persons who were on that slate and the manner in which that slate was supported" (J.A. 18).

At petitioner's trial, his counsel acknowledged, although he used varying descriptive terms, that the subject under inquiry which the government had proved was Communist infiltration of the press. Thus, he said that the subject was "the press" (Tr. 245, 246, 259); "Communist [redacted] infiltrat[redacted] of "mass communication media in the United States"

(Tr. 259); and "the newspapers and Communism in the newspaper field" (Tr. 289). Indeed, counsel stated that it is "crystal-clear that what this subcommittee was interested in was to determine whether there were Communists working in the press" (Tr. 340). It was on the basis of these facts that the defense argued that the questioning of petitioner violated freedom of the press guaranteed by the First Amendment (Tr. 245–266) and that Congress was not acting pursuant to a legislative purpose because it cannot legislate concerning the "content of the press" (Tr. 245–266, 340–342).

The first two questions and the last question on which petitioner was convicted were pertinent on their face to the subject of Communist activities in news media. These questions were whether petitioner, who was admittedly a newspaper reporter (J.A. 17), was at that time a member of the Communist Party (count 1); whether he had ever attended Communist meetings (count 2); and whether he had ever been a member of the Communist Party (count 8). As this Court said in *Barenblatt, supra,* where a Congressional committee was investigating Communist infiltration of education: "petitioner refused to answer questions as to his own Communist Party affiliations, whose pertinency was of course clear beyond doubt." 360 U.S. at 125.[1] As we have noted (see pp. 18–19), if these questions alone were perti-

[1] The other questions on which petitioner was convicted clearly related to Communist activities (see *supra*, pp. 5, 10–12). The record, however, does not show that they related to Communist activities in news media.

nent, petitioner's conviction must be upheld since he was given a general sentence on all counts.

Petitioner, however, emphasizes (Pet. Br. 25) that the Subcommittee counsel "expressly disclaimed that 'Communist infiltration into the field of communications' was the subject of hearings." This statement, which was made to another witness (Gov. Ex. 8, p. 1616), cannot overcome the clear statements—made both before and after counsel's brief remark—by both the Chairman of the Subcommittee and Senator Hennings that Communist infiltration of news media was the subject under inquiry.

Petitioner also contends (Pet. Br. 25–26) that the Subcommittee counsel stated at the hearings (also to another witness) (Gov. Ex. 8, p. 1652) and the Assistant United States Attorney argued at petitioner's trial (J.A. 130–133) that the purpose of the investigation was to investigate Communist activities generally. As we have shown in our brief in *Shelton, supra,* p. 36, the subject of Communist activities in news media is merely a portion of the broader subject of Communist activities generally. Thus, when the Subcommittee counsel and the Assistant United States Attorney stated that the Subcommittee was investigating Communist activities generally, this did not preclude proof that it was simultaneously investigating Communist activities in news media.* Moreover, if there was an inconsistency

*The other statements made by the Subcommittee counsel at petitioner's trial, on which petitioner relies (Pet. Br. 24), similarly do not help his position. They say merely that (1) the Subcommittee was investigating "several allied fields" of Communist activity (J.A. 54) (which is consistent with

between the ambiguous testimony at the trial by the Subcommittee counsel and the clear statements at the hearings by the Chairman and another member of the Subcommittee, the latter evidence is clearly controlling. And if there is any inconsistency between the ambiguous statements of the Assistant United States Attorney at petitioner's trial and the clear statements of the Subcommittee members at the hearings, certainly it is the evidence introduced by the government, not the government's characterization of this evidence, which is controlling.

Furthermore, even if petitioner were correct and the subject under inquiry was Communist activities in the United States generally, the government proved the pertinency of all eight questions on which petitioner was convicted. All eight, either on their face or as shown by the explanations to petitioner at the hearing and the testimony of the Subcommittee counsel at petitioner's trial (see *supra*, pp. 5, 10–12), were directly related to Communist activities. And as we indicate in our brief in *Liveright, supra*, pp. 42–44, this Court has never required that a Congressional committee investigate only one narrowly defined subject at a given time. It is enough that the committee have a subject under inquiry and that the

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the subject stated by the Subcommittee of Communist activity in news media); (2) that "strategy and tactics of World Communism" is the general subject which the Subcommittee had been investigating and it was affixed as an editorial title to the transcript of these and other hearings (J.A. 61–62) (a subject of which Communist activity in news media is a part); and (3) that the *authority* of the Subcommittee includes any organization, including the Communist Party, attempting to overthrow the government of the United States by force (J.A. 84–85).

questions which a witness is asked be pertinent to this subject.

## V

### PETITIONER WAS NOT ENTITLED TO DISMISSAL OF THE INDICTMENT OR A HEARING, ON THE BASIS OF BROAD ALLEGATIONS THAT GOVERNMENT EMPLOYEES GENERALLY ARE BIASED

Petitioner contends (Pet. Br. 44–45) that the indictment should have been dismissed because the grand jury included government employees who were biased against him because of the government's loyalty and security programs. Alternatively, petitioner argues that he was entitled to a hearing in the district court to allow him to prove bias. As we have shown, however, in our brief in *Shelton* v. *United States*, *supra*, pp. 62–64, a defendant is not entitled to dismissal of the indictment merely because government employees were on the grand jury. We have also argued in our brief in *Shelton* (pp. 64–76) that a defendant is entitled to a hearing to inquire into the activities and beliefs of grand jurors—even if we assume, contrary to the holdings of numerous cases, that a defendant is sometimes entitled to such a hearing—only when he alleges specific and convincing evidence of strong bias in individual grand jurors. Here, however, as in *Shelton* (see our brief in *Shelton*, pp. 76–78), petitioner's Motion to Dismiss the Indictment (J.A. 3–7) and accompanying affidavit (which is virtually identical with that in *Shelton;* see the record in No. 9, this Term, pp. 4–8) * did not allege bias or fear with re-

* The affidavit is identical with that submitted to the trial court by the petitioner in *Liveright* v. *United States*, *supra*.

gard to any individual grand juror and did not even state any specific evidence of fear or intimidation among government employees generally resulting from the security program which petitioner would show if a hearing were granted. In these circumstances, the trial court properly refused to grant petitioner a hearing to conduct a general exploration of the motives and beliefs of the grand jurors.

## VI

### THE INDICTMENT WAS NOT REQUIRED TO SPECIFY THE SUBJECT UNDER INQUIRY OR THE PERTINENCY OF THE QUESTIONS TO THIS SUBJECT, OR TO ALLEGE THAT PETITIONER'S REFUSAL TO ANSWER WAS WILFUL, OR TO STATE THE DELEGATION OF AUTHORITY FROM THE PARENT COMMITTEE TO THE SUBCOMMITTEE

The indictment upon which petitioner was convicted alleged that the questions petitioner refused to answer "were pertinent to the question then under inquiry" and that "the defendant unlawfully refused to answer those pertinent questions" (J.A. 1). Petitioner claims (Pet. Br. 15–20) that the indictment was invalid because it failed (1) to specify the subject under inquiry when petitioner testified, (2) to specify the pertinency of the questions he refused to answer to this subject, (3) to allege that his refusal to answer was wilful; and (4) to state the delegation of authority from the parent Judiciary Committee to the Subcommittee.

As we have shown in our brief in *Shelton* v. *United States*, *supra*, pp. 78–83, petitioner's contention that the indictment was required to state the specific subject under inquiry is inconsistent with Rule 7(c) of

the Federal Rules of Criminal Procedure and with decisions both of this Court and the courts of appeals. For the same reasons, an indictment which states that the questions are pertinent to the subject under inquiry need not provide the specific reasoning underlying this allegation of pertinency. As to petitioner's contention that the indictment was required to state that his refusal to answer was wilful, we have shown in our brief in *Liveright* v. *United States, supra* pp. 50–51, that it is sufficient if, as here, the indictment alleges that the witness has "unlawfully" refused to answer.

Petitioner also contends that the indictment was invalid because it did not state that the Judiciary Committee had authorized the Subcommittee to act and did not give the basis of this authority. Petitioner, however, did not raise this issue in his petition for a writ of certiorari (see Pet. 3, 13). Therefore, under Rule 40(1)(d)(2) of the Rules of this Court, the issue is not properly before the Court unless perhaps it constitutes "plain error." We submit that not only is there no plain error, but that the indictment was plainly valid.

The indictment alleged that the hearings were being conducted by a Subcommittee of the Judiciary Committee "pursuant to * * * Senate Resolution 366 of the 81st Congress and 58 of the 84th Congress" (J.A. 1), which authorize the Judiciary Committee or one of its subcommittees to investigate Communist activities (see our brief in *Liveright supra*, pp. 19–28). Thus, the indictment clearly implies that the Judiciary Committee authorized the Subcommittee to investigate Communist activities.

Certainly, it is not necessary under Rule 7(c) of the Federal Rules of Criminal Procedure—which states that the indictment "shall be a plain, concise and definite written statement of the essential facts constituting the offense charged"—to allege the specific resolution of the parent committee authorizing the subcommittee's investigation. We know of no indictment under 2 U.S.C. 192 which makes such an allegation and yet, as far as we or petitioner have been able to ascertain, no court has dismissed an indictment on this ground. The only case cited by petitioner (Pet. Br. 19–20), *United States* v. *Lamont*, 236 F. 2d 312, 315–316 (C.A. 2), holds merely that the indictment must state the authority of the parent committee—a requirement which the indictment here expressly satisfied."

## VII

### THE TRIAL COURT DID NOT DENY PETITIONER THE RIGHT OF CROSS-EXAMINATION BY DENYING HIS MOTION TO SUBPOENA THE SUBCOMMITTEE'S FILES AND REFUSING TO ALLOW CROSS-EXAMINATION WHICH SOUGHT TO OBTAIN CONFIDENTIAL INFORMATION

Petitioner contends (Pet. Br. 30–34) that he was improperly restricted in his right of cross-examination by the trial court's denial of his motion to sub-

[10] Petitioner also claims (Pet. Br. 15–16) that the indictment was defective in that "it merely stated the offense in the generic term of the statute * * *." As we have shown in our brief in *Shelton*, *supra*, pp. 79–80, recent decisions of this Court make clear that such an allegation is sufficient under Rule 7(c), F.R. Crim. P., and the Fifth Amendment.

poena the Subcommittee's file and its refusal to allow him to cross-examine the Subcommittee counsel concerning the information on which the Subcommittee subpoenaed petitioner.

Petitioner's motion to subpoena the records of the Subcommittee (J.A. 8–10) asked, *inter alia*, for the production of all written information in the files of the Judiciary Committee or the Subcommittee (including confidential material) related to petitioner and Marcella Hitschmannova. The trial court granted the government's motion to quash (J.A. 49). In addition, during his cross-examination of the Subcommittee counsel, petitioner's counsel asked for the witness to produce materials he had concerning an airplane flight by petitioner outside the United States, on which, according to the information of the Subcommittee, he was accompanied by a Communist Party courier (J.A. 97; see J.A. 54–55). This request was denied on the ground it sought the disclosure of confidential information (J.A. 97). In addition, petitioner's counsel renewed his motion, which was again denied, for all material in the Subcommittee's files relating to Marcella Hitschmannova (J.A. 97). Petitioner sought, through these motions, to obtain evidence showing the absence of probable cause to subpoena petitioner and the lack of any legislative purpose in the hearings (J.A. 48).

The Subcommittee counsel testified on direct examination concerning the information possessed by the Subcommittee which was the basis for subpoenaing petitioner (J.A. 51–55, 65). Petitioner's counsel cross-examined him extensively on this subject (J.A.

93–104). He received answers stating that the information received by the Subcommittee relating to Marcella Hitschmannova was both oral and written; that the oral information was received shortly before the executive session; that the Subcommittee had received other oral information concerning Miss Hitschmannova over a year previously; that the earlier information came to someone else on the Subcommittee and the later information to himself, the Subcommittee counsel; that written information concerning Miss Hitschmannova came to the Subcommittee more than a year before the executive session; that the written information had no signature; that the letter giving the Subcommittee information concerning Robert Shelton (the petitioner in No. 9, this Term) did not provide information as to petitioner here; that he (the Subcommittee counsel) knew the source of the written material; that the information stated that Miss Hitschmannova had been a courier for the Communist Party in Europe; that the Subcommittee had oral information concerning the contacts between her and petitioner; that this information was given to the Subcommittee counsel directly; that Miss Hitschmannova visited repeatedly the place where petitioner lived; that she had been connected with the United Nations; that petitioner had flown to Latin America and had been accompanied by a Communist courier; that this information was written; that the Subcommittee had files showing that petitioner had run on the Rank and File ticket for vice-president of the New York Newspaper Guild; that there were public allegations at the time of the election that the ticket

was supported by the Communist Party; and that he (the Subcommittee counsel) did not know whether petitioner was the William Price who had signed a statement in 1941 in the Daily Worker defending the Communist Party. The Subcommittee counsed refused to answer only ten questions, all of which concerned the precise identity of the Subcommittee's confidential informants, information which would have provided considerable indication of their identity, and information as to the manner in which the Subcommittee secured confidential information (J.A. 93–95, 98, 99, 100, 102). Thus, the only questions which the court allowed the Subcommittee counsel not to answer would have disclosed confidential information.

The issue here, as in *Shelton, supra,* and *Liveright, supra,* is whether a witness who refuses to answer questions asked by a Congressional committee is entitled to the disclosure of the files of the committee, either directly or by cross-examination of a government witness, before he can be punished for contempt. As in those cases (see our briefs in No. 9, pp. 59–60, and in No. 11, pp. 51–57), we submit that a witness is not entitled to this disclosure merely in the hope that these files will impeach the witness' testimony on an issue which is not even an element of the offense. In short, while this Court indicated in *Barenblatt,* 360 U.S. at 134, and *Wilkinson* v. *United States,* 365 U.S. 399, at 412, that a Congressional committee must present information showing that it had a reasonable basis for subpoenaing the witness, those cases did not require that the information or reasons which caused

the Committee to subpoena the witness be subject to plenary judicial review.

## VIII

### PETITIONER CANNOT CLAIM FOR THE FIRST TIME IN HIS BRIEF ON THE MERITS IN THIS COURT THAT THE SUBCOMMITTEE VIOLATED HIS RIGHTS UNDER THE FOURTH AND FIFTH AMENDMENTS SINCE IT DID NOT HAVE PROBABLE CAUSE TO SUBPOENA HIM. IN ANY EVENT, PETITIONER'S RIGHTS WERE NOT VIOLATED

Petitioner claims (Pet. Br. 20–21) that his rights under the Fourth and Fifth Amendments were violated because the Subcommittee did not have probable cause to believe that he had information pertinent to its inquiry. Petitioner, however, never raised this contention prior to filing his brief on the merits in this Court. As we have shown in our brief in *Shelton, supra*, pp. 41–43, his failure to raise this issue before the Subcommittee [11] prevented him from raising it when he was tried for contempt. He again waived any contention he might have made—unless the error was "obvious"—by failing to raise the issue in the district court or the court of appeals. *E.g., United States* v. *Atkinson*, 297 U.S. 157, 159–160; *United States* v. *Socony Vacuum Oil Co.*, 310 U.S. 150, 239; *Johnson* v. *United States*, 318 U.S. 189, 200. And finally, he did not raise the issue in his petition for a writ of certiorari in this Court. Under Rule 40(1)(d)(2) of the Rules of this Court he cannot raise the issue in his brief on the merits unless there was "plain error." *E.g., Kessler* v. *Strecker*, 307 U.S. 22, 34.

We submit that petitioner's contention, far from showing that his conviction was plainly erroneous, is

[11] See *supra*, pp. 6, 9, for the grounds on which petitioner relied.

without merit. As we show in our brief in *Shelton, supra*, pp. 43–46, the Fourth Amendment does not apply to subpoenas to testify as contrasted to subpoenas *duces tecum*. We further show (pp. 46–48) that, even if the Fourth Amendment does apply, this Court has held in *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, that its restrictions on administrative subpoenas (with regard to subpoenas *duces tecum*) are not nearly so strict as with regard to arrests and searches and seizures. The only requirements are that "the investigation is authorized by Congress, is for a purpose Congress can order, and the documents sought are relevant to the inquiry" (*id.* at 209). If the Fourth Amendment applies at all, we submit that this standard is applicable to subpoenas to testify as well as subpoenas *duces tecum*, and to Congressional committees as well as executive agencies.

Even if the Fourth Amendment does not apply to subpoenas to testify, this Court has indicated in *Barenblatt* v. *United States*, 360 U.S. 109, 134, *Braden* v. *United States*, 365 U.S. 431, 433–435, and *Wilkinson* v. *United States*, 365 U.S. 399, 412–413, that a Congressional committee investigating Communist activities cannot, consistent with the First Amendment, subpoena a witness "as the result of an indiscriminate dragnet procedure, lacking in probable cause for belief that [the witness] possessed information which might be helpful to the subcommittee" (365 U.S. at 412). As we contend in our brief in *Shelton*, pp. 50–55, those cases clearly do not apply the standard of probable cause for arrests or searches and seizures. Rather, they apply essentially the same standard as

was laid down for subpoenas *duces tecum* in the *Oklahoma Press* case.

Applying the above standards to the facts here, the Committee clearly had reasonable grounds to believe that petitioner "possessed information which might be helpful to the committee" and that was "relevant to the inquiry." The Subcommittee counsel testified in considerable detail concerning information possessed by the Subcommittee as to Communist activities in which petitioner engaged (see *supra*, p. 5). Thus, the Subcommittee had information that petitioner, admittedly a newspaperman, had run as a candidate for vice-president of the New York Newspaper Guild, which had been infiltrated by Communists, on the Communist-supported ticket; that petitioner had received numerous visits up until the time of the hearing from Marcella Hitschmannova, who was believed to be a Communist courier and otherwise active in the Communist movement for years; and that petitioner had flown an airplane to Latin America accompanied by a courier for the Communist Party. Thus, even though the Subcommittee had no direct information that petitioner was a member of the Communist Party, it had basis for believing that petitioner had information concerning Communist activities in the United States and, more specifically, concerning the subject under inquiry when petitioner testified, *i.e.*, Communist activities in news media.

As to petitioner's claim under the Fifth Amendment, he expressly did not claim that his answers would incriminate him (J.A. 21). Apparently, peti-

tioner is relying on the due process clause. But he cites no authority for the proposition that this clause limits the power of Congressional committees to issue subpoenas to testify. In any event, it certainly provides no stricter a standard than that provided by the Fourth Amendment (if it applies) and by the First Amendment—that is, whether the committee has reasonable basis for believing that the witness has information of value in its investigation. And, as we have seen, the Subcommittee had such information here.

## CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment of the court of appeals should be affirmed.

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